INDEX

	Page
Citation to opinions below	2
Jurisdiction	2
Question presented	2
Statutes and regulation involved	3
Statement of the case	3
Reason for granting writ	8
Conclusion	18

* * *

Appendix A: Statutes and regulation	1a
Appendix B: Opinions and judgments below	7a
Court of Appeals opinion	7a
Court of Appeals judgment	19a
District Court judgment	20a
Appendix C: Conflicting Supreme Court opinion	23a

CITATIONS

Cases

Bath v. United States, 211 F. Supp. 368 (S.D. Tex. 1962), aff'd, 323 F. 2d 980 (5th Cir. 1963) 5, 17

Colony, Inc. v. Commissioner, 357 U.S. 28 (1958) . 8, 9, 10, 11, 12

Zola Klein, 42 T.C. 1000 (1965) 16

Snell v. Commissioner, 97 F. 2d 891 (5th Cir. 1938) 16

Genevieve B. Walker, 46 T.C. 630 (1966), *acq.*, 1967-1 Cum. Bull. 3 ..... 13, 16

Statutes

Internal Revenue Code of 1939, § 275(c), 53 Stat. 86	3, 8
Internal Revenue Code of 1954:	
Section 61	3, 16
Section 453	3
Section 453(d)	3, 15, 16
Section 662(c)	3, 5
Section 1014(b)(6)	3, 5, 14
Section 1014(c)	3, 14
Section 6501	2

PAGE

Section 6501(a) 3, 6, 7
Section 6501(e)(1)(A) 3, 7, 8, 9, 10
Section 6501(e)(1)(A)(ii) 10, 11, 12, 15, 16
Judicial Code and Judiciary, 28 U.S.C. § 1254(1)..... 2
Judicial Code and Judiciary, 28 U.S.C. § 1340..... 6

Regulations

Treas. Reg. § 1.453-9(a) (1958) 3, 15, 16

Miscellaneous

1959 Commissioner of Internal Revenue Annual Report..... 17
1960 Commissioner of Internal Revenue Annual Report..... 17
1961 Commissioner of Internal Revenue Annual Report..... 17
1962 Commissioner of Internal Revenue Annual Report..... 17
Webster's New Collegiate Dictionary (1961) 15
Webster's Third New International Dictionary (1964)..... 15

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BANK OF THE SOUTHWEST NATIONAL ASSOCIATION, HOUSTON,
IN ITS CAPACITY AS TRUSTEE OF THE
MRS. DUNBAR N. CHAMBERS—COMMUNITY ONE-HALF
OF ESTATE OF DUNBAR N. CHAMBERS, TRUST,
Petitioner,

v.

ROBERT L. PHINNEY,
DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Bank of the Southwest National Assocation, Houston, in its capacity as trustee of the "Mrs. Dunbar N. Chambers — Community One-Half of Estate of Dunbar N. Chambers, Trust," prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered against it on February 13, 1968, in the case of *Robert L. Phinney* v. *Ruth Kiehl Chambers and Bank of the Southwest National Association, Houston, in Its Capacity as Trustee of the Mrs. Dunbar N. Chambers — Community One-Half of Estate of Dunbar N. Chambers, Trust.*

CITATIONS TO OPINIONS BELOW

The District Court did not render an opinion; its judgment (R. 197-99), printed in Appendix B hereto, *infra* p. 20a, is reported at 19 Am. Fed. Tax R.2d 789 and 67-1 U.S. Tax Cas. ¶ 9296. The opinion of the Court of Appeals (R. 207-21), printed in Appendix B hereto, *infra* p. 7a, is reported at ..... F. 2d ....., 21 Am. Fed. Tax R.2d 651, and 68-1 U.S. Tax Cas. ¶ 9214.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on February 13, 1968 (R. 222; *infra* p. 19a). No petition for rehearing was filed with the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The primary question is whether, under section 6501,[1] the assessment of an alleged income tax deficiency against Petitioner was barred under the three-year statute of limitations or was timely under the six-year statute of limitations. The answer to such primary question depends upon whether, on the federal income tax return filed by Petitioner in its capacity as trustee of the "Mrs. Dunbar N. Chambers — Community One-Half of Estate of Dunbar N. Chambers, Trust," the alleged understatement[2] of the gain arising out of Petitioner's share of the final payment on an

---

[1] In this Petition all section numbers relate to the Internal Revenue Code of 1954 (26 U.S.C.) unless otherwise indicated.

[2] The trial and appeal of this case has been restricted to the limitations question. For the purpose of deciding such question, it has been assumed that the decision in *Bath* v. *United States*, 323 F. 2d 980 (5th Cir. 1963), is correct and that, therefore, Petitioner's income was understated. However, Petitioner is of the view that the *Bath* decision is wrong and that its income was not in fact understated.

installment sale of corporate stock constitutes an omission from gross income within the meaning of section 6501 (e)(1)(A).

STATUTES AND REGULATION INVOLVED

The statutory provisions involved are sections 61, 453(d), 662(c), 1014(b)(6), 1014(c), 6501(a), and 6501(e)(1)(A) of the Internal Revenue Code of 1954, and section 275(c) of the Internal Revenue Code of 1939, 53 Stat. 86. Treasury Regulation § 1.453-9(a) (1958) is also involved. These provisions are printed in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE

In 1954 Mrs. Chambers and her husband, Dunbar N. Chambers, sold to Mr. Frank Sharp at a profit certain shares of the capital stock of High Point Realty Company which they owned as community property. Mr. Sharp gave them a cash down payment and a promissory note to evidence the balance of the consideration (R. 43-44). On their joint income tax return for 1954, the Chambers reported the sale and the income therefrom on the installment method in accordance with section 453 (R. 44).

On October 27, 1956, Mr. Chambers died and, under his will, Petitioner became his executor. Since there were debts against the community estate of Mr. and Mrs. Chambers, Petitioner as trustee also took possession of Mrs. Chambers' one-half interest in the community property (R. 117).

On the date of Mr. Chambers' death, the unpaid balance of Mr. Sharp's note was $795,957.73, which was its fair market value. Mr. Chambers' community one-half interest in such note, $397,978.87, was included in his gross estate for federal estate tax purposes, and its value was accepted and approved by the Government[3] (R. 117-18). After some

[3] For convenience, Respondent will sometimes be referred to as the "District Director" or the "Government."

further payments were made, the note's principal balance of $751,472.13 was satisfied on April 11, 1958, by the payment of $541,472.13 in cash and real estate with a fair market value of $210,000.00 (R. 34-35).

For the fiscal year ended September 30, 1958, Petitioner filed a U. S. Fiduciary Income Tax Return, Form 1041, for the decedent's estate. Petitioner reported on Schedule D of such return $318,904.77 as the gain resulting from the decedent's one-half share of the $751,472.13 final payment on the sale of the High Point Realty Company stock (R. 131). On a schedule attached to and supporting Schedule D of such return, Petitioner reported the receipt of $375,736.07 (representing the decedent's one-half share of the final payment), the percentage of such amount which constituted gain, and the amount of gain to be reported (R. 139).

Likewise, for the fiscal year ended September 30, 1958, Petitioner on or about March 15, 1959, filed a U. S. Fiduciary Income Tax Return, Form 1041, in its capacity as trustee for Mrs. Chambers' one-half interest in the community property (hereinafter referred to as the "trust return"). On Schedule D of the trust return Petitioner reported a lump sum as the amount of gain resulting from sales of stock. On a schedule attached to and supporting Schedule D of the trust return, Petitioner reported under the heading "Sale of Stock" the other one-half of the final receipt in respect of the sale of the High Point Realty Company stock as follows:

Description	Date Acquired	Sold	Price	Basis	Gain or (Loss)
High Point Realty Stock	10-27-56	1958	$375,736.06	$375,736.06	–0–

The basis claimed of $375,736.06 represented the fair market value of one-half of Mr. Sharp's note at the date

of the decedent's death, less payments received subsequent to his death (R. 118-19, 193-94). Such fair-market-value basis was claimed pursuant to Petitioner's belief that under section 1014(b)(6), a surviving wife in Texas obtained a stepped-up basis in her community one-half of a promissory note upon the death of her husband.

The net income reported on the trust return filed by Petitioner for the fiscal year ended September 30, 1958, totaled $5,676.14, all of which was long-term capital gain; such net income was shown on Schedule C of the return to have been distributed to Mrs. Chambers as the sole beneficiary of the trust (R. 185-96). For calendar 1958, Mrs. Chambers filed a U. S. Individual Income Tax Return, Form 1040, and reported the amount of $5,676.14 as capital gain in Schedule D of such return on the line provided for "[illegible]t long-term gain (or loss) from partnerships and fiduciaries." In other words, Mrs. Chambers included in her 1958 individual gross income the amounts distributed to her from the trust during its fiscal year ending within her calendar year in accordance with section 662(c) of the 1954 Code (R. 45-46, 82-83, 86).

More than three years after Petitioner and Mrs. Chambers had filed their 1958 returns, the trial court decision was handed down in *Bath* v. *United States,* 211 F. Supp. 368 (S.D. Tex. Nov. 30, 1962), *aff'd,* 323 F. 2d 980 (5th Cir. 1963), which held that although a surviving wife in Texas generally is entitled to a stepped-up basis in her one-half share of community property upon the death of her husband, she is not entitled to such step-up in the basis of a community property promissory note where the installment method of reporting was elected with respect to the sale that gave rise to the note. The *Bath* case was the first legal authority to deny such a step-up in basis. Following the decision in the *Bath* case, the District Director ex-

amined the trust return filed by Petitioner and concluded, among other things, that Mrs. Chambers' half interest in the community property note of Mr. Sharp did not acquire a basis equal to its fair market value on the date of her husband's death. Therefore, its basis did not offset the amount received, and income resulted. Pursuant to this conclusion, a statutory notice of deficiency was mailed to Petitioner on February 18, 1965, the pertinent portion of which provided that "taxable income was understated in the amount of $318,904.77 for the year ended September 30, 1958 . . ." (R. 153). Such taxable income, alleged to have arisen out of the final payment on the sale of the High Point Realty Company stock, also was inconsistently charged against Mrs. Chambers for the year 1958 under a statutory notice of deficiency dated February 18, 1965 (R. 95-98). The total assessments against Petitioner and Mrs. Chambers were paid to the Government on April 16, 1965 (R. 48, 121). Petitioner and Mrs. Chambers filed their respective claims for refund on July 29, 1965, which claims were denied by the Government on December 17, 1965 (R. 47-48, 121-22).

Upon denial of the claims for refund, Petitioner and Mrs. Chambers brought suit in the United States District Court for the Western District of Texas to recover the taxes wrongfully collected from them (R. 2-19). Accordingly, jurisdiction was conferred by 28 U.S.C. § 1340.

In the District Court Petitioner and Mrs. Chambers contended the Government's assessments were barred by the three-year period of limitations under section 6501(a). The Government admitted that only one of the taxpayers was liable for any tax owing and proceeded primarily against Mrs. Chambers. The Government urged that it was the duty of Mrs. Chambers individually rather than

Petitioner as trustee to report all of the taxable income arising out of her one-half interest in the community estate, and that the assessment against her was timely because of her failure to report in any manner the final payment of Mr. Sharp's note. Such failure was said to have resulted in an omission from her gross income of an amount properly includible therein which was in excess of 25% of the amount of gross income stated in her individual return, thereby bringing into play the six-year period of limitations under section 6501(e)(1)(A). Alternatively, the Government maintained that, even if both the trust return filed by Petitioner was proper and the assessment against Mrs. Chambers was barred by the three-year statute of limitations, the assessment against Petitioner was timely under the six-year statute of limitations because in its reporting Petitioner had omitted from gross income an amount properly includible therein which was in excess of 25% of the amount of gross income stated in the trust return. The District Court rendered summary judgment in favor of both Petitioner and Mrs. Chambers on the ground that the assessments against them were barred by the three-year period of limitations prescribed by section 6501(a) of the 1954 Code (R. 197-99).

Since the Government admitted that only one of the parties was liable for any tax due, the Court of Appeals held, for the purpose of its decision, that the trust return filed by Petitioner for the fiscal year ending September 30, 1958, was proper, and affirmed the District Court's judgment in favor of Mrs. Chambers. However, the Court of Appeals reversed the District Court's judgment in favor of Petitioner on the ground that the six-year period of limitations operated to make the Government's assessment against Petitioner timely because Petitioner's overstatement of basis constituted an omission from gross income

of an amount properly includible therein which was in excess of 25% of the amount of gross income stated in its trust return. The Court of Appeals reasoned that, even if an item of gross income is reported in a return, there is an omission of gross income unless the reporting is sufficient to enable the Government by mere inspection of the return to detect any error made with respect to such item. In the Court of Appeals' view, Petitioner's reporting was not sufficient to enable the Government to detect, by inspecting the face of the return, any error made with respect to the basis claimed because of Petitioner's alleged failure to describe the nature of the item allegedly omitted as an installment sale receipt and to make a contention on the return. The Court of Appeals also reasoned that the Government's failure to challenge Petitioner's reporting before the expiration of the three-year period of limitations, when it had challenged similar reporting on the part of another taxpayer within such period, was proof that Petitioner's reporting was inadequate.

REASON FOR GRANTING WRIT

THE DECISION OF THE COURT OF APPEALS WITH RESPECT TO SECTION 6501(e)(1)(A) IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

The question of what constituted an omission from gross income within the meaning of section 275(c), the 1939 Code predecessor of what is now section 6501(e)(1)(A), was before this Court in the case of *Colony, Inc.* v. *Commissioner*, 357 U.S. 28 (1958). This Court there held that, if an item is reported on a return, but the amount of gain reported is understated by reason of an overstatement of basis, there is no "omission" of gross income within the meaning of what is now the six-year statute of limitations. Although *Colony* involved a 1939 Code tax year, it was

decided after the enactment of the 1954 Code and the Court observed that its decision was in harmony with the 1954 Code. Contrary to *Colony,* the Court of Appeals in the instant case held that Petitioner's overstatement of basis with respect to an item of income reported on its return constituted an "omission" of gross income.

In *Colony* the taxpayer's gross receipts from a sale of property were stated on its tax return, but the gross profit from the sale was understated as a result of overstating the basis of such property. It would have been impossible to detect the taxpayer's error by merely inspecting the face of the return, and this Court in no way suggested that such detection need be possible. In light of the legislative history of the statute this Court agreed with the taxpayer that "to omit" means "to leave out or unmentioned; not to insert, include or name." With respect to such legislative history, this Court went on to state, 357 U.S. at 36-37:

> "We think that in enacting § 275(c) [the 1939 Code provision which is the predecessor of section 6501(e)(1)(A)] Congress manifested no broader purpose than to give the Commissioner *an additional two years* [*now three years*] *to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage.* And this would seem to be so whether the error be one affecting 'gross income' or one, such as overstated deductions, affecting other parts of the return. To accept the Commissioner's interpretation and to impose a five-year [now six-year] limitation when such errors affect 'gross income,' but a three-year limitation when they do not, not only

> would be to read § 275(c) more broadly than is justified by the evident reason for its enactment, but also to create a patent incongruity in the tax law . . ." (Emphasis added.)

Under *Colony,* no gross income was omitted from the return filed by Petitioner. The statutory language construed in *Colony* is identical to that of section 6501(e)(1)(A). Likewise, the facts of the instant case are almost identical to those of *Colony.* No claim is made that Petitioner failed to report its share of the final payment on the sale of the High Point Realty Company stock. Instead, the deficiency was based upon the determination that gross profits were understated by reason of an overstatement of basis. Under *Colony,* an overstatement of basis simply does not constitute an "omission" of gross income. It cannot be said that Petitioner's return provided no clue on its face as to the existence of the item alleged to have been omitted. The item was reported on the face of the return, and, consequently, the Government was at no disadvantage in discovering the alleged error. Clearly, any prejudice suffered by the Government in this case resulted solely from its failure to investigate the return within three years after it was filed.

As noted previously, the statutory language construed by this Court in *Colony* is precisely the same as that now found in subparagraph (A) of section 6501(e)(1). In enacting the 1954 Code, however, Congress added clause (ii) to section 6501(e)(1)(A). This clause, section 6501(e)(1)(A)(ii), provides that:

> "(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner

adequate to apprise the Secretary or his delegate of the nature and amount of such item."

This provision was added by Congress for the obvious purpose of limiting the applicability of the six-year statute of limitations, and in the *Colony* case, which was decided in 1958, this Court observed that its decision was in harmony with the provisions of the 1954 Code. In the instant case, however, the Court of Appeals construed the provision as imposing very stringent requirements in direct contravention of the provision's intended function as well as the clearly defined policy of the six-year statute of limitations. The proper construction of the provision is an important question of federal tax law that has not been, but should be, settled by this Court. If the Court of Appeals' interpretation is allowed to stand, one is faced with the incongruous proposition that, contrary to Congressional expectations and the *Colony* decision, the enactment of section 6501(e)(1)(A)(ii) expanded rather than contracted the operation of the six-year statute of limitations.

Meaning of Section 6501(e)(1)(A)(ii)

Section 6501(e)(1)(A)(ii) is by no means an unambiguous statute. Questions frequently arise as to what constitutes the "nature" of an item of gross income, what constitutes the "amount" of an item of gross income, and what constitutes sufficient disclosure thereof. These questions cannot be answered by a literal reading of the words of the statute. Instead, section 6501(e)(1)(A)(ii) must be construed within the context of the intended purpose of the six-year statute of limitations. As pointed out by this Court in *Colony,* the six-year statute of limitations is intended to operate where a taxpayer leaves a taxable "item" off his return; the statute's purpose is no broader than to give the Commissioner more time to investigate a return

where, because of the taxpayer's complete failure to report a taxable item, the return on its face provides no clue as to the "existence" of the omitted item, thereby placing the Commissioner at a special disadvantage in discovering such item.

In light of this overall purpose, section 6501(e)(1)(A)(ii) must be interpreted to mean that an item is not deemed to be omitted from gross income if the nature and amount of the item are disclosed in the return, or in a statement attached thereto, in such a manner as to make it reasonably possible for the Government to discover an error by inspection and investigation of the return within three years after it is filed. The Court of Appeals' conclusion that an item must be disclosed in a manner sufficient to permit the Government to detect errors merely by inspecting the face of a return is contrary to the *Colony* case and patently absurd. The function of the statute is simply to require disclosure of the existence of a taxable item so that in investigating the return the Government will suffer no special handicap in detecting errors. To require a taxpayer to disclose in his return all possible errors affecting gross income would be unrealistic, to say the least.

In the first place, a taxpayer is not bound to disclose all possible ways or the worst possible way a transaction might be taxed. Obviously, a taxpayer should not and cannot be expected to anticipate either all possible claims by the Government or all cases which will be decided during the three-year period following the filing of his return.

In the second place, the form of the tax return furnished by the Government is not geared to any such disclosure. It does not require detailed descriptions, explanations, or contentions with respect to the taxable transactions to be reported thereon, and no item on the face of a tax return

is even denominated "gross income." If, as in the instant case, a taxpayer fills in all appropriate blanks provided on an income tax return, reporting every taxable item in the gross or maximum figure called for, and arrives at an incorrect computation of the tax only by reason of a difference between him and the Government as to the legal construction to be applied to a reported receipt, the taxpayer's use in one stage of the computation of a figure different than that ultimately determined to be correct should not be deemed an "omission" of gross income.

Petitioner's Disclosure

On Petitioner's return both the nature and amount of the item in question were disclosed in a manner sufficient to enable the Government to discover the alleged error by inspection and investigation of the return within the three-year period following its filing. The nature of the item is capital gain or loss from the sale of stock[4], which gain or loss is in question solely because of the basis claimed. The amount of the item is a maximum of $375,736.06, which is the amount of the gross receipts from the transaction and the amount of stepped-up basis claimed.

Petitioner's disclosure of the nature and amount of the item occurs in the supporting schedule to Schedule D of its trust return. There is just one proper place in the printed form of the tax return provided by the Government to report and disclose a receipt from an installment sale of stock resulting in long-term capital gain or loss. That one place is in Schedule D entitled "Gains and Losses from Sales or Exchanges of Property," and more particularly on line 7 thereof under the heading "Long Term Capital Gains and Losses — Assets Held More Than 6 Months." Likewise,

[4] Genevieve B. Walker, 46 T.C. 630 (1966), *acq.*, 1967-1 Cum. Bull. 3.

Schedule D contains just one column in which to report and disclose basis.

There was not enough space on the printed form of Schedule D to fill in all the sales, and so in accordance with the routine and common practice a supporting schedule was attached and incorporated by a reference thereto on the face of Schedule D. The supporting schedule is expressly labeled "Schedule D" and uses the same column headings. The various amounts reflected on the supporting schedule tie back into the total amounts shown on Schedule D. The nature of the item as capital gain or loss from the sale of High Point Realty Company stock was plainly reflected on the supporting schedule. Likewise, the amount of the item, $375,736.06, was plainly reported on the supporting schedule.

The Court of Appeals was of the view that the nature of the item was insufficiently disclosed by Petitioner because it was reported as gross income from a sale of stock rather than from an installment sale or a payment on an installment note. The primary reason advanced for this view was Petitioner's inconsistency in reporting the final payment on the sale of the High Point Realty Company stock as between the trust return filed by Petitioner and the income tax return filed by Petitioner on behalf of Mr. Chambers' estate. On the estate's return, the executor reported one-half of the final payment, the percentage of profit under the installment method, and the taxable portion of such receipt. No stepped-up, fair-market-value basis in the installment note was claimed on the estate's return because such step-up was prohibited by the terms of section 1014(c). However, on the trust return filed by Petitioner with respect to Mrs. Chambers' one-half interest in the community property, such stepped-up, fair-market-value basis was not prohibited by section 1014(c), and, therefore, it was claimed pursuant to section 1014(b)(6).

The only possible error made by Petitioner was the amount of basis claimed on the return. Otherwise, its reporting was technically accurate. For federal tax purposes, the difference between the amount received and the basis of the installment note is considered as resulting from the sale of the property in respect of which the note was received,[5] and, accordingly, the nature of the item as long-term capital gain from the sale of High Point Realty Company stock was plainly reported. Since Petitioner contended that none of its receipt was taxable by reason of the offsetting stepped-up basis, it would have been futile to set out an additional computation and schedule showing $375,736.06 as the amount received, zero as the percentage of profit, and zero as the taxable portion. This would have added nothing to the disclosure as already made which shows the amount of the gross receipt, claims a basis equal thereto, and as a result reports no gain or loss.

Nature of the Item

Nevertheless, any lack of symmetry in the reporting on the two returns has no bearing whatever upon the sufficiency of the disclosure of the nature of the item on Petitioner's trust return. The reporting on the trust return must and does stand on its own.

Congress, in enacting section 6501(e)(1)(A)(ii), did not specify what was meant by the phrase "the nature . . . of such item." However, its choice of the word "item" rather than the word "transaction" indicates that such phrase was intended to mean "the nature of the item of gross income," or more specifically, "the nature of the item of gross income allegedly omitted from the return." According to common everyday understanding, the term "nature" means "character, kind, sort, or type."[6] Under

---

[5] See Int. Rev. Code of 1954, § 453(d); Treas. Reg. § 1.453-9(a) (1958).

[6] Webster's Third New International Dictionary (1964); Webster's New Collegiate Dictionary (1961).

federal tax law, an item of gross income is characterized as being either compensation for services, or interest, or rents, or long-term capital gain, or dividends, etc. Clearly, it was disclosure of this nature or character of an item of gross income that was intended to be required by section 6501(e)(1)(A)(ii). In the instant case, the nature or character of the item of gross income allegedly omitted from Petitioner's trust return is long-term capital gain or loss from the sale of corporate stock.

The nature of the item here in question is neither an installment sale nor the satisfaction of an installment-sale note. Such a designation may be descriptive of the nature or character of the *transaction*, but it is certainly not descriptive of the receipt's nature or character as an item of gross income. There is no such category of gross income as gain or loss from an installment sale or from the satisfaction of an installment-sale note. Nowhere under section 61, which delineates various kinds of gross income, is gross income of any such nature listed, and the reason is clear. Any gain or loss resulting from a payment on an installment sale of property or the satisfaction of an installment note is considered and reportable as resulting from the sale of the property in respect of which the note was received.[7] In the instant case the property previously sold and in respect of which the note was received was High Point Realty Company stock, a capital asset, and Petitioner accurately reported the nature of the item of gross income as long-term capital gain or loss from the sale of such stock.[8]

---

[7] See Int. Rev. Code of 1954, § 453(d); Snell v. Commissioner, 97 F. 2d 891 (5th Cir. 1938); Zola Klein, 42 T.C. 1000 (1965); Treas. Reg. § 1.453-9(a) (1958).

[8] Genevieve B. Walker, 46 T.C. 630 (1966), *acq.*, 1967-1 Cum. Bull. 3.

Court of Appeals' Reasoning

The Court of Appeals' reasoning that the nature of the item was insufficiently disclosed because the Government failed to challenge the item's treatment within the three-year period of limitations, even though at one point in such period it was contesting a similar transaction in the *Bath* case, is fallacious. If this reasoning is sound, then the three-year statute of limitations would rarely apply. The Court of Appeals simply assumed that the Government actually examined the return during the three-year period and that inadequate disclosure was the reason no challenge was made. This assumption has no basis either in the record or in fact. The fact of the matter is that Petitioner's reporting was sufficient to enable the Government to make the challenge here in issue, but for some unknown reason the challenge did not occur until shortly after the *Bath* case was decided. The Government might well have failed to examine Petitioner's return within the three-year period of limitations. Only a small number of the individual and fiduciary income tax returns filed each year are actually examined.[9] Since the *Bath* case was a case of first impression, it may have been a test case the decision of which prompted additional examinations. On the other hand, someone may have examined the return within the three-year period and con-

---

[9] For the fiscal year ended June 30, 1959, 60,008,000 individual and fiduciary income tax returns were filed and 2,422,000 were examined. 1959 COMM'R OF INT. REV. ANN. REP. 9, 13. For the fiscal year ended June 30, 1960, 61,260,000 individual and fiduciary income tax returns were filed and 2,571,000 were examined. 1960 COMM'R OF INT. REV. ANN. REP. 27, 36. For the fiscal year ended June 30, 1961, 62,046,000 individual and fiduciary income tax returns were filed and 3,079,000 were examined. 1961 COMM'R OF INT. REV. ANN. REP. 20, 27. For the fiscal year ended June 30, 1962, 62,326,000 individual and fiduciary income tax returns were filed and 3,120,000 were examined. 1962 COMM'R OF INT. REV. ANN. REP. 22, 33.

sciously chosen not to raise the issue. Also, someone may have examined the return and determined precisely what had occurred without even realizing that any issue existed. In short, the Government's failure to challenge the item within the three-year period could have been due to any number of reasons.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated April 10, 1968.

Respectfully submitted,

CHARLES W. HALL
PHILLIP L. MANN
LAURANCE C. MOSHER, JR.
Bank of the Southwest Building
Houston, Texas 77002
Counsel for Petitioner

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
Bank of the Southwest Building
Houston, Texas 77002